

# Taxes vs. Fees: A Curious Confusion

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## I. INTRODUCTION

In recent years, local governments have been called upon to provide an increasingly broader range of services and regulatory activities.<sup>1</sup> Those governments have constantly searched for ways to finance the demands placed on them through tax increases,<sup>2</sup> user fees,<sup>3</sup> and other types of charges.<sup>4</sup>

As detailed in this Article, there are constitutional and other restraints on how taxes and fees are structured and applied.<sup>5</sup> In Washington, the distinction between taxes and fees can be decisive in determining whether a particular governmental charge will sustain judicial scrutiny.<sup>6</sup> Unfortunately, Washington case law concerning the distinction between taxes and fees has been murky and confusing, primarily because the courts often resort to a simplistic dichotomy between taxes and regulatory fees.<sup>7</sup> This distinction fails to recognize the existence of alternative charges.<sup>8</sup>

In its 1995 decision, *Covell v. City of Seattle*, the Supreme Court of Washington attempted to provide an updated framework for addressing the difference between taxes and fees.<sup>9</sup> The *Covell* tests, as they came to be known, provided a useful and significant contribution to understanding what actually makes a tax a tax and what makes a user fee a user fee. Notwithstanding *Covell*, Washington courts have clung to the doctrine that every governmental charge can be understood as either a tax or a regulatory fee. Accordingly, Washington courts have failed to adequately acknowledge a different category of fees that was implicitly recognized in *Covell*: *user fees*, including commodity charges and burden-offset charges.<sup>10</sup>

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1. See generally 1 A HISTORY OF WASHINGTON'S LOCAL GOVERNMENTS: FINAL REPORT OF THE WASHINGTON STATE LOCAL GOVERNMENT STUDY COMMISSION 29-41 (1988).

2. *Franks & Son, Inc. v. State*, 136 Wash. 2d 737, 750, 966 P.2d 1232, 1239 (1998) ("A tax is defined as a levy made for the purpose of raising revenue for a general governmental purpose.").

3. *Id.* ("[A] fee is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation.").

4. See generally Mun. RESEARCH & SERV. CTR. OF WASH., A REVENUE GUIDE FOR WASHINGTON CITIES AND TOWNS 41-43 (1999) [hereinafter REVENUE GUIDE].

5. See, e.g., WASH. CONST. art VII, § 2 ("[T]he aggregate of all tax levies upon real and personal property by the state . . . shall not in any year exceed one percent of the true and fair value of such property in money . . .").

6. E.g., *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wash. App. 171, 178, 931 P.2d 208, 212 (1997) ("[W]hether the County has the authority to impose the disputed fees depends upon whether they are taxes or regulatory fees.").

7. E.g., *Covell v. City of Seattle*, 127 Wash. 2d 874, 905 P.2d 324 (1995).

8. See *infra* Part V.

9. *Covell*, 127 Wash. 2d at 879, 905 P.2d at 327.

10. See *infra* notes 188-96.

In Section II, this Article describes the basic characteristics of taxes as that term historically has been understood in Washington State and delineates the protections put in place for taxpayers. Section III discusses the fundamental characteristics of non-tax fees and the different rules that have evolved to protect those who must pay fees and similar rates and charges. Section IV outlines the *Covell* tests and suggests that while those tests were a significant advance over the Supreme Court of Washington's earlier approach, leftover language about the regulatory nature of fees has prolonged the muddle. Section V reviews each of the post-1995 cases that cited *Covell* and demonstrates that the *Covell* framework worked well in some instances while failing in others because of the lingering attempt to squeeze all governmental charges into just two boxes. Specifically, limiting government charges to either taxes or regulatory fees does not take advantage of everything *Covell* has to offer as an analytical guide.<sup>11</sup> The Appendix summarizes the analysis provided in this Article.

## II. TAXES: IMPOSED ANYWHERE AND USED FOR ANYTHING— SO LONG AS THE IMPOSITION IS “FAIR”

### A. *Imposed Anywhere and Used for Anything*

In the words of a leading public finance economist, “Taxes, the principal means of financing government expenditures, are compulsory payments that do not necessarily bear any direct relationship to the benefits of government goods and services received.”<sup>12</sup> From a legal viewpoint, taxation is viewed as a fundamental, necessary, and sovereign power of government.<sup>13</sup> Our Anglo-American political and legal traditions hold that everyone who receives the general benefits of government should pay his or her fair share of the costs to maintain that government.<sup>14</sup> There is constant debate over what constitutes a fair system of taxation and a fair allocation of the tax burden: taxes based on

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11. See, e.g., *Thurston County Rental Owners Ass'n* 85 Wash. App. at 171, 931 P.2d at 208.

12. DAVID N. HYMAN, *PUBLIC FINANCE: A CONTEMPORARY APPLICATION OF THEORY TO POLICY* 23 (3d ed. 1990).

13. *Lawrence v. State Tax Comm'n of Miss.*, 286 U.S. 276, 279 (1932) (“[T]he most plenary of sovereign powers, [used] to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits.”); *Love v. King County*, 181 Wash. 462, 467, 44 P.2d 175-77 (1935).

14. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 380 (Cambridge University Press 1970) (“[T]is fit everyone who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it.”).

wealth,<sup>15</sup> on income and ability to pay,<sup>16</sup> on economic activity,<sup>17</sup> or on perceived benefits.<sup>18</sup> A substantial amount of income redistribution and cost-shifting of public goods and services takes place through the tax system.<sup>19</sup> Indeed, we have a broad assortment of taxes imposed to raise money from a variety of sources and activities: real and personal property taxes,<sup>20</sup> leasehold excise taxes,<sup>21</sup> gross business income taxes,<sup>22</sup> retail sales and use taxes,<sup>23</sup> estate taxes,<sup>24</sup> and many others.<sup>25</sup>

What is worth noting about taxes is that there is no connection between the person who bears the burden of a tax dollar and who determines how to spend tax revenue.<sup>26</sup> "Taxes are defined to be 'burdens or charges imposed by legislative authority on persons or property, to raise money for public purposes, or, more briefly, an imposition for the supply of the public treasury.'" <sup>27</sup> Unless the legislature chooses to earmark taxes (which it

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15. HYMAN, *supra* note 12, at 584 (discussing a comprehensive wealth tax base).

16. *Id.* at 489 (discussing taxation of personal income).

17. *See id.* at 556 (discussing the direct taxation of consumption: the expenditure tax).

18. *See id.* at 2 ("We all benefit from government and expenditures. We rely on governments to provide us with such basic services as national defense, education, highways and mass transit, and social programs to maintain the incomes and welfare of the unemployed, the poor, and the elderly.").

19. *See generally* ROBERT P. STRAUSS, A STUDY OF ALTERNATIVE TAX STRUCTURES FOR THE STATE OF WASHINGTON 5-21 (1987).

20. WASH. REV. CODE §§ 84.04.080, .090 (2002).

21. WASH. REV. CODE § 82.29A (2002).

22. WASH. REV. CODE § 82.04 (2002).

23. WASH. REV. CODE §§ 82.08, 82.12 (2002).

24. WASH. REV. CODE § 83.100 (2002).

25. WASH. STATE DEPT. OF REVENUE, TAX REFERENCE MANUAL (2002) [hereinafter TAX REFERENCE MANUAL] (discussing admissions taxes, household taxes, and taxes for streets and roads). For a discussion of city revenue sources, see REVENUE GUIDE, *supra* note 4. In the past, poll taxes ("head taxes" or "capitation" taxes) played a role in Washington public finance, and net income taxes were approved on several occasions by the Legislature and once by the voters. *See generally* PHIL ROBERTS, A PENNEY FOR THE GOVERNOR, A DOLLAR FOR UNCLE SAM: INCOME TAXATION IN WASHINGTON (2002). Alfred Harsch, *The Washington Tax System—How It Grew*, 39 WASH. L. REV. 944 (1965); Hugh D. Spitzer, *A Washington State Income Tax—Again?*, 16 U. PUGET SOUND L. REV. 515 (1993).

26. *Gruen v. Tax Comm'n.*, 35 Wash. 2d 1, 33-34, 211 P.2d 651-70 (1949), *overruled in part by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963).

27. *State ex rel. Nettleton v. Case*, 39 Wash. 177, 182, 81 P. 554, 556 (1905) (quoting 27 Am. & Eng. Ency. Law (2d ed.) at 578); *Hillis Homes, Inc. v. Snohomish County*, 97 Wash. 2d 804, 809, 650 P.2d 193, 195 (1982) *superseded by statute* (*Hillis Homes I*); *see also* *San Telmo Assoc. v. City of Seattle*, 108 Wash. 2d 20, 24, 735 P.2d 673-75 (1986) (stating Seattle's "shifting the public responsibility of providing [low-income] housing to a limited segment of the population . . . is a tax ....").

sometimes does to make a bitter pill easier to swallow), tax revenue may be used for *any* governmental function that lawmakers reasonably determine is a public purpose. Such governmental functions include: public safety;<sup>28</sup> regulatory activities;<sup>29</sup> public facilities;<sup>30</sup> and even for goods usually sold as commodities,<sup>31</sup> such as water or electricity.<sup>32</sup> For accounting purposes, tax revenue may be placed in *any* fund; either the general fund for any use designated by the legislative authority or in an earmarked fund.<sup>33</sup>

An example of the absence of a nexus between the burdens and the benefits of a tax is Washington's cigarette and tobacco tax revenue. Much of this tax revenue is placed in the general fund.<sup>34</sup> However, the Washington State Legislature earmarked a portion of this revenue for various public projects including: financing of water pollution control facilities;<sup>35</sup> health services for low-income people;<sup>36</sup> drug enforcement and education; and criminal justice and crime prevention.<sup>37</sup> Although there may be an attenuated connection between

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28. See, e.g., WASH. REV. CODE § 81.14B.030 (2002) (imposing 911 excise taxes on the use of switchboard access lines and radio access lines).

29. See *infra* notes 197-204.

30. See, e.g., WASH. REV. CODE § 82.14.400 (2002) (imposing sales and use taxes for zoo, aquarium and wildlife facilities).

31. Arguably, some taxes are so earmarked and so related to the activity generated that they are no longer best thought of as taxes at all. For example, Article II, Section 40 of the Washington State Constitution requires that all motor vehicle fuel taxes be "placed in a special fund to be used exclusively for highway purposes." WASH. CONST. art II, § 40. Because there is a direct connection between fuel consumption and road use, the gas tax might be better thought of as a user fee of the "burden offset charge" variety. See *infra* notes 42-56 and accompanying text.

32. See WASH. REV. CODE § 82.32.390 (2002).

33. See, e.g., WASH. REV. CODE § 82.32.380 (2002) (requiring the State Treasurer to deposit excise taxes in "the state general fund or such other fund as may be provided by law"); WASH. REV. CODE § 82.14B.030 (taxing emergency services communications systems).

34. See WASH. REV. CODE § 82.32.380.

35. WASH. REV. CODE § 82.24.027 (2002) (depositing monies collected from additional tax "upon the sale, use, consumption, handling, possession, or distribution of cigarettes" into the water quality account); WASH. REV. CODE § 82.26.025 (2002); WASH. REV. CODE § 82.32.390 (2002) (accepting monies received from the imposition on sales or use of articles of tangible personal property which become or are to become part of the new or existing water pollution control facilities and activities); WASH. REV. CODE § 70.146.030 (2002).

36. WASH. REV. CODE § 82.24.020 (2002) (depositing monies collected from additional tax "upon the sale, use, consumption, handling, possession, or distribution of all cigarettes" into the health services account); WASH. REV. CODE § 82.26.020 (2002); WASH. REV. CODE § 43.72.900 (2002) (defining health services account).

37. WASH. REV. CODE § 82.24.020 (depositing monies collected from additional tax "upon the sale, use, consumption, handling, possession, or distribution of all cigarettes" into the health services account); WASH. REV. CODE § 69.50.020 (2002) (designating receipts from WASH. REV. CODE § 82.24.020, among others, to be deposited into the violence and drug

low-income smokers and their use of public health services, there certainly is no link between tobacco users and the beneficiaries of groundwater protection programs.

### B. *Taxpayer Protections*

Taxes cast a broad net to raise general revenue for the public purse.<sup>38</sup> Because taxpayers have no guarantee that their dollars will directly benefit them, a number of protections have evolved to assure fairness in the distribution of the tax burden.<sup>39</sup> The burden of the property tax, the oldest major tax in Washington state,<sup>40</sup> must be allocated consistent with the "uniformity provisions" of Article 7, Section 1 of the Washington State Constitution.<sup>41</sup> Without the approval of a supermajority of the voters in a taxing district, the maximum annual tax burden on any piece of property is limited to one percent of its value.<sup>42</sup> Constitutional uniformity requirements do not strictly apply in their entirety to excise taxes.<sup>43</sup> However, those taxes must be uniform within reasonably created legislative classifications.<sup>44</sup> These classifications cannot violate equal protection and may not be arbitrary or abusive.<sup>45</sup> Excise taxes must be geographically uniform.<sup>46</sup>

A further protection for those partially burdened by taxes is the limitation that they may not be imposed except pursuant to express statutory authorization.<sup>47</sup> However, this is only after the prospective taxpayers have an

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enforcement account).

38. See REVENUE GUIDE, *supra* note 4 (discussing various taxes designed to raise revenue); HYMAN, *supra* note 12 ("We rely on governments to provide us with such basic services as national defense, education, highways and mass transit, and social programs to maintain the incomes and welfare of the unemployed, the poor, and the elderly.").

39. *E.g.*, WASH. CONST. art. VII, § 1 ("All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only.").

40. Harsch, *supra* note 25, at 945.

41. WASH. CONST. art. VII, § 1; see WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION (2nd ed. 1984) (presenting a thorough state-by-state history of American uniformity clauses since colonial times).

42. WASH. CONST. art. VII, § 2.

43. See *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 407, 25 P.2d 91, 93 (1933) (citing *Brown-Formom Co. v. Kentucky*, 217 U.S. 563 (1910)).

44. *Id.*

45. *Id.* at 407-08, 25 P.2d at 93; see also *Boeing Co. v. State*, 74 Wash. 2d 82, 86, 442 P.2d 970, 972 (1968); *Texas Co. v. Cohn*, 8 Wash. 2d 360, 369, 112 P.2d 522, 527 (1941).

46. *Bond v. Burrows*, 103 Wash. 2d 153, 157, 690 P.2d 1168, 1170 (1984). A tax levied for state purposes shall be uniform throughout the state; a tax levied for county purposes shall be uniform throughout the county.

47. *Hillis Homes v. Snohomish County*, 97 Wash. 2d 804, 809, 650 P.2d 193, 195

opportunity to affect the legislative process; the power to tax cannot be inferred.<sup>48</sup> This principle is best illustrated when local governments attempt to impose general revenue-raising measures without explicit authorization.<sup>49</sup>

Taxes, then, are vehicles to raise money for allocation to *any* proper governmental purpose.<sup>50</sup> There is no connection between the property or activities taxed and the use of the proceeds. Further, there is no connection between the burdened taxpayer and the person or group benefitted. Tax money may be deposited in any fund the legislative body elects. In sum, taxes are a broad-brush method of raising revenue.<sup>51</sup> As a result, special protections are built into the taxation process to ensure property taxes are uniform,<sup>52</sup> excise taxes are broadly applied within reasonable classifications,<sup>53</sup> and taxes are never imposed without express statutory authority.<sup>54</sup>

### C. *Taxes, Public Goods and "Public Bads"*

Economic theory is helpful in understanding the background of any particular system of taxes and charges.<sup>55</sup> However, one must distinguish between taxes from a *legal* standpoint (*i.e.*, impositions to raise money generally and subject to a particular set of legal protections),<sup>56</sup> and how taxes *function* from an *economic* standpoint (*e.g.*, taxes redistribute income,<sup>57</sup> focus economic resources on certain public goals<sup>58</sup> and projects,<sup>59</sup> and cause businesses and individuals to make certain choices that affect the economy<sup>60</sup>). Additionally, one must be cautious about generalizations concerning economic theory and the application of that theory to law.<sup>61</sup> Taxes are a key source of

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(1982) (*Hillis Homes I*).

48. *Id.* at 808-09, 650 P.2d at 195.

49. *Id.* at 809, 650 P.2d at 195; *Carkonen v. Williams*, 76 Wash. 2d 617, 627-28, 458 P.2d 280, 286-87 (1969); *Cary v. City of Bellingham*, 41 Wash. 2d 468, 472, 250 P.2d 114, 117 (1952).

50. *See Hillis Homes I*, 97 Wash. 2d at 809-10, 650 P.2d at 195-96.

51. *See HYMAN*, *supra* note 12, at 23-24.

52. *E.g.*, *Wellington River Hollow v. King County*, 113 Wash. App. 574, 54 P.3d 213, 220 (2002).

53. *E.g.*, *Dean v. Lehman*, 143 Wash. 2d 12, 25, 18 P.3d 523, 531 (2001).

54. *Hillis Homes I*, 97 Wash. 2d at 809, 650 P.2d at 195.

55. *See generally* HYMAN, *supra* note 12.

56. *Id.* at 23.

57. *Id.* at 408.

58. *Id.* at 25-26.

59. *Id.*

60. HYMAN, *supra* note 12, at 26.

61. For example, economists correctly observe that taxes are the primary source of funds for "public goods," of which national defense is the classic example: national defense

funds for public services and for government exercise of regulatory powers.<sup>62</sup>

It is also important to note that economists distinguish among pure public goods,<sup>63</sup> congestible public goods,<sup>64</sup> and price-excludable public goods.<sup>65</sup> Some economists identify semipublic goods and mixed (public/private) goods, for which all or a portion of the costs can be allocated through user fees.<sup>66</sup> Economists also recognize the existence of public bads, known as *negative externalities*.<sup>67</sup> For example, public bads are activities that hold a hidden cost to the general public, and for which society does not pay through normal market pricing mechanisms.<sup>68</sup> Professor David Hyman notes, "Air pollution, for example, is a pure public bad if pollutants diffuse in the atmosphere, thereby affecting all individuals, independent of the location of their residence."<sup>69</sup> Unless allocated by government to the responsible parties (internalizing the externalities), such external costs are not mitigated or paid for by those who cause the problem and must be borne by the public at large.<sup>70</sup>

There are a range of public goods and public bads. As governments become more sophisticated and capable of allocating the costs of providing those goods to the users, or recovering the costs of mitigating those bads from their producers, the broad brush of general taxes is no longer the appropriate sole source of revenue to pay for congestible public goods, price-excludable public goods, mixed goods, and public bads.<sup>71</sup> Instead, user charges can be imposed.<sup>72</sup> Over the past century, payment for a number of goods and bads has

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benefits everyone equally and cannot appropriately be charged to any particular group of users. *Id.* at 135.

62. For example, the funding of government public health and inspection programs, zoning, fire safety, building code enforcement and police. *See generally*, TAX REFERENCE MANUAL, *supra* note 25; JOHN J. MIKESELL, FISCAL ADMINISTRATION: ANALYSIS AND APPLICATIONS FOR THE PUBLIC SECTOR (3d ed. 1991).

63. Public goods, like national defense, do not decrease in value as more people "use" them and from which no one can be excluded as a beneficiary. HYMAN, *supra* note 12, at 136.

64. Congestible public goods are goods such as highways, in "which crowding or congestion reduces the benefits to existing consumers when more consumers are accommodated." *Id.* at 156.

65. Price-excludable public goods are goods such as recreational facilities, which can be priced to reduce overall consumption and to help pay for the goods. *Id.* at 156-57.

66. *See, e.g.*, J. Andrew Hoerner, *What's a Tax, Anyway?* (Tax Notes April 24, 1989) available in LEXIS, Nexis Library.

67. HYMAN, *supra* note 12, at 97 (emphasis added).

68. *Id.*

69. *Id.* at 137.

70. *See id.* at 105-08.

71. *See id.*

72. Economists sometimes label as a pollution "tax" an imposition on specific polluters that would be treated as a "fee" or "charge" from a legal standpoint. *See, e.g.*, RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE



been shifted from tax revenues to specific users for water, sewer service, garbage handling, and other commodities and services. For example, Seattle did not transfer its sewer operations from a general fund supported agency to a rate-based utility until 1955.<sup>73</sup> Moreover, the city's Solid Waste Collection and Disposal was not transferred from the general fund to a utility until 1961.<sup>74</sup>

From a legal standpoint, these various user charges are distinctly different from taxes—different both in terms of who bears the burdens and benefits and in terms of the distinct legal protections surrounding and regulating the use of those charges.

### III. USER FEES: OFFSETTING THE COST OF COMMODITIES, SERVICES, AND BURDENS

There are several different types of user fees and charges recognized in Washington law.<sup>75</sup> They are closely related and generally share certain basic characteristics. First, they are imposed on specific persons, activities, or properties that receive a service or benefit, or that cause negative externalities (public bads) that burden the rest of the population.<sup>76</sup> Second, they come with a distinct set of legal protections to ensure that the level of each charge does not exceed the cost of the service, benefit, or mitigation of the public bad allocated to the person charged and to ensure that the proceeds of the charge are used solely for the provision of services, benefits, or mitigation and *not* used for general governmental purposes.<sup>77</sup>

As shown in the Appendix, by reviewing each type of user fee recognized in Washington, as well as comparing them with each other, we can discern user fees from taxes.

#### A. *Commodity Charges: Fees Allocated Directly to Consumers of Government Products and Services*

Commodity charges are fees for products or services provided by governments to consumers in a fashion similar to the way private sector businesses provide products or services.<sup>78</sup> Economists often characterize these

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750 (4th ed. 1984).

73. SEATTLE, WASH. ORDINANCE 84390 (1955).

74. SEATTLE, WASH. ORDINANCE 90379 (1961).

75. *E.g.*, WASH. REV. CODE § 35.92.010 (2002) (city water rates); WASH. REV. CODE § 35.87A.010 (2002) (commodity charges).

76. *See, e.g.*, WASH. REV. CODE § 35.87A.010.

77. *See, e.g.*, WASH. REV. CODE § 35.92.010.

78. *See* MIKESELL, *supra* note 62, at 357.

products and services as private goods because they are used by individual consumers rather than the public collectively.<sup>79</sup> Classic examples of governmentally provided commodities are water and electricity.<sup>80</sup> They are often provided by utilities, self-contained government companies focused on the specific product or service.<sup>81</sup> Commodities may also include special services not available to the public at large.<sup>82</sup>

Governmentally imposed commodity charges are often called rates,<sup>83</sup> which have been present in Washington since the 1890s.<sup>84</sup> It was during this time that Washington's government began creating special-purpose utilities, or public enterprises, that provided services, charged rates, and deposited those rates into special funds for use solely to support the enterprises.<sup>85</sup> Early on, those charges were recognized as something different from taxes.<sup>86</sup> In 1909 the Washington Supreme Court rejected the assertion that Spokane's water rates amounted to "an excessive tax on the community," holding "water rates are not taxes."<sup>87</sup> "The consumer pays for a commodity which is furnished for his comfort and use."<sup>88</sup> Fees for special access, or use of a public facility such as a swimming pool, tennis court, toll bridge, ferry or auditorium, can also be appropriately labeled a commodity charge.<sup>89</sup> Such charges can make congestible public goods less congested and ration price-excludable public goods among users while paying for the cost of their use of the facilities.<sup>90</sup> Economists sometimes treat these fees as a way to account, allocate, and pay for *positive* externalities created by these public goods.<sup>91</sup>

Many statutes expressly permit public providers of commodities and services to impose rates and charges.<sup>92</sup> However, under the Accountancy Act,

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79. *Id.*

80. *Id.* at 359.

81. *E.g.*, WASH. REV. CODE § 35.92.010 (granting cities or towns the authority to acquire and maintain their own waterworks).

82. A good example of these is "assessments" within Parking and Business Improvement Areas to pay for street decorations, music, and security. WASH. REV. CODE § 35.87A.010 (2002).

83. *See, e.g.*, WASH. REV. CODE § 35.92.010.

84. 1 WASH. STATE LOCAL GOVERNANCE STUDY COMM'N, A HISTORY OF WASHINGTON'S LOCAL GOVERNMENTS: FINAL REPORT OF THE LOCAL GOVERNANCE COMMISSION 19 (1988).

85. *Id.*

86. *See id.*

87. Twitchell v. City of Spokane, 55 Wash. 86, 89, 104 P. 150, 151 (1909).

88. *Id.*

89. *See* HYMAN, *supra* note 12, at 156-57.

90. *Id.*

91. *See id.* at 160.

92. *See, e.g.*, WASH. REV. CODE § 35.92.010 (2002) (city water rates); WASH. REV.

those rates must be deposited into a special fund,<sup>93</sup> used for the purpose of defraying the expenses of producing the commodity,<sup>94</sup> and then transferred into the general fund.<sup>95</sup> Another protection further ties the imposition of commodity charges to the users of the commodity: rates (including connection charges) typically must be uniform for the same class of customers or service. However, government rate setters have substantial leeway in establishing classes and allocating costs to various groups of customers based on differences in costs of service, operation and maintenance, location of customers, differing types of service, different capital cost allocations, and other matters that present a reasonable difference as a ground for distinction.<sup>96</sup> In contrast to the express statutory authority required for taxes, the power to impose rates and charges for commodities may be inferred from the authority to provide those commodities<sup>97</sup> so long as the charges a customer pays are reasonably proportionate to the customer's allocable share of the capital and operating costs of providing the commodity or service.<sup>98</sup>

*B. Burden Offset Charges: Fees Allocated Directly to  
Activities that Use Public Resources by  
Burdening Those Resources*

Burden offset charges are similar to commodity charges. However, instead of being paid by the buyers of *things*, burden offset charges are fees that allocate and recover the cost of ongoing public programs to handle negative impacts from those who cause them.<sup>99</sup> Both commodity charges and burden

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CODE § 35.92.050 (2002) (city electricity charges); WASH. REV. CODE § 36.94.140 (2002) (county water and sewer rates); WASH. REV. CODE § 54.16.040 (2002) (public utility district electricity rates); WASH. REV. CODE § 57.08.005(10) (2002) (water district water rates).

93. WASH. REV. CODE § 43.09.220 (2002).

94. *See id.*

95. WASH. REV. CODE § 43.09.210 (2002).

96. *See, e.g.*, WASH. REV. CODE § 35.92.010; WASH. REV. CODE § 36.94.140; *Silver Shores Mobile Home Park, Inc. v. City of Everett*, 87 Wash. 2d 618, 623-24, 555 P.2d 993, 996 (1976); *Morse v. Wise*, 37 Wash. 2d 806, 811-12, 226 P.2d 214, 217 (1951); *Lincoln Shiloh Assocs., Ltd. v. Mukilteo Water Dist.*, 45 Wash. App. 123, 129-30, 724 P.2d 1083, 1086-87 (1986).

97. *Hillis Homes, Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 105 Wash. 2d 288, 298, 714 P.2d 1163, 1168-69 (1986) (*Hillis Homes II*).

98. *Id.* at 300, 714 P.2d at 1169.

99. There was early recognition of burden offset charges and processing fees as something different from a tax. In the "head money cases," the United States Supreme Court held that a per immigrant tax imposed on ship owners who brought newcomers to America was not a tax at all, but rather a processing fee or mitigation charge. *Edye v. Robertson*, 112 U.S. 580, 595 (1884). The Court wrote:

[T]he true answer . . . is that the power exercised in this instance is not the

offset charges are usually called rates. Sewer, garbage, and storm water rates are typical examples of burden offset charges.<sup>100</sup> Economists view these charges as an efficient way of internalizing the costs of negative externalities.<sup>101</sup> The classic example, air pollution caused by a manufacturing plant, produces a cost that, absent government regulation, will be passed on to the general public rather than being internalized in the cost of making the product.<sup>102</sup> The public will breathe the bad air and, over the long term, bear the cost of the pollution. If not controlled or mitigated, the polluter receives an undeserved benefit from the public—the ability to burden others with pollution without having to pay.

One approach to resolve this problem is to regulate polluters by requiring equipment to be placed in the emission causing device.<sup>103</sup> The cost of handling the pollution will then be directly allocated to the manufacturer and internalized in the cost passed on to consumers of the manufactured product rather than to the public at large.<sup>104</sup> In this example, the government exercises its police power and regulates by forcing the manufacturer to take a specific action to offset its burden on society.<sup>105</sup>

Another way government can cause an offset and internalization of the cost of negative externalities is through direct government action.<sup>106</sup> The government directly alleviates the specific problem and charges the producer of the externality to fund the government's action.<sup>107</sup> This is not a regulatory activity. Rather, it is an alternative to regulation; an alternative that approaches the problem through a government service provider that is often organized as a separate utility.<sup>108</sup> Traditional examples are municipal collection and handling

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taxing power. . . . The title of the act, "An Act to regulate immigration," is well chosen. It describes, as well as any short sentence can describe it, the real purpose and effect of the statute. Its provisions, from beginning to end, relate to the subject of immigration, and they are aptly designed to mitigate the evils inherent in the business of bringing foreigners to this country, as those evils affect both the immigrant and the people among whom he is suddenly brought and left to his own resources.

*Id.*

100. See WASH. REV. CODE § 35.21.120-.158 (2002); WASH. REV. CODE § 35.67.300-.331 (2002). See generally *Teter v. Clark County*, 104 Wash. 2d 227, 704 P.2d 1171 (1985).

101. See MUSGRAVE & MUSGRAVE, *supra* note 72, at 743.

102. See *id.* at 744-45.

103. See *id.* at 747.

104. See *id.* at 747-48.

105. See *id.* at 750.

106. See generally WASH. REV. CODE §§ 35.21.120-.158 (2002); WASH. REV. CODE §§ 35.67.300-.340 (2002) (permitting cities to create sewage and garbage systems and utilities).

107. See WASH. REV. CODE §§ 35.21.120-.158, 35.67.300-.340.

108. See WASH. REV. CODE §§ 35.21.120-.158, 35.67.300-.340.

of garbage and wastewater, both of which prevent human activities from causing public health problems.<sup>109</sup> Those who pay garbage and sewer rates are not paying for government provided *commodities* like water or electricity.<sup>110</sup> However, they are, just the same, users of a governmentally provided system established to handle or mitigate the external impacts caused by their own activities. Burden offset charges such as garbage and sewer rates allocate and internalize his or her proportionate share of the total cost of handling negative externalities of human activity—the production of garbage and sewage.<sup>111</sup>

In *Teter v. Clark County*, the Supreme Court of Washington treated storm water systems in the same fashion as garbage and sewage programs, permitting a government to impose on a property owner his allocable share of the cost of a public surface water system established to handle runoff from his and others' land.<sup>112</sup> The court labeled these payments tools of regulation (and not taxes) because of their direct connection to and payment for a system of dealing with the negative public impacts of private activities.<sup>113</sup> Although Clark County could (and did) directly regulate each landowner's use of property in order to minimize surface water runoff, the county system of storm water ditches, pipes, catch basins, and diversion ponds was not so much a *regulatory* activity as it was a *utility*.<sup>114</sup> Consequently, the cost could be allocated by user fees to those who burden the public environment (and burden downstream private property owners) by the way they use their own private property.<sup>115</sup>

Despite the fact that Mr. Teter did not receive a commodity or a direct service, he was a user of the storm water system just as a homeowner uses a sewage system each time he flushes the toilet.<sup>116</sup> In each case, a system is established to allocate, through fees, the external impacts of human activity to those engaged in that activity, and to internalize and offset the cost of handling the public bads arising therefrom.<sup>117</sup> Applying the traditional standards and protections applicable to user charges, the *Teter* court held the storm water charges proper so long as the fees reflected the user's allocable share of the costs of the program, were used solely for the costs of that program, and were

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109. See, e.g., WASH. REV. CODE § 35.21.120-.158, 35.67.300-.340.

110. See, e.g., *City of Spokane v. Carlson*, 73 Wash. 2d 76, 84, 436 P.2d 454, 459 (1968) (upholding mandatory municipal collection of inorganic garbage when the plaintiff challenged a city that barred him from disposing of that solid waste on his own).

111. *Id.*

112. 104 Wash. 2d 227, 237-38, 704 P.2d 1171, 1179 (1985).

113. *Id.* at 239, 704 P.2d at 1180.

114. See *id.* at 240-41, 704 P.2d at 1181.

115. *Id.* at 237, 704 P.2d at 1179.

116. *Id.* at 232, 704 P.2d at 1176.

117. *Teter v. Clark County*, 104 Wash. 2d 227, 232-34, 704 P.2d 1171, 1176-78 (1985).

not siphoned off into the general fund.<sup>118</sup> Furthermore, if burden offset fees are disproportionately high, they run the risk of being challenged as an unconstitutional taking.<sup>119</sup>

The Washington State Supreme Court has sometimes stated that if a user fee is higher than the user's proportionate share of program costs, then the fee becomes fiscal in character and is therefore a tax.<sup>120</sup> It is correct that if an imposition is made to raise money for general public purposes, it is a tax.<sup>121</sup> However, the fact that a particular user charge exceeds the user's fair share does not automatically convert that charge into a tax.<sup>122</sup> After all, the excess revenue might continue to be deposited into the appropriate special fund for utility purposes.<sup>123</sup> If a user charge is too high, it is just too high. When the size of the charge exceeds the proportionate share rule and the service classification rule, the excess amount can be rejected on that basis alone. Similarly, if a property tax exceeds legal limits or is not applied uniformly it does not lose its basic character as a tax—it is simply rejected for failure to conform to a protection inherent to taxes.<sup>124</sup>

Growth impact fees under Washington Revised Code sections 82.02.050-.090, transportation fees under Washington Revised Code chapter 39.92, and conditions or charges tied directly to property development are a slightly different form of burden offset charge.<sup>125</sup> Growth impact fees are imposed on developers to pay for public parks and open space, streets and roads, and schools and fire protection facilities.<sup>126</sup> Moreover, they are identified in capital facilities plans and have been demonstrated to serve, or to be "necessitated by"

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118. *Id.* at 233-34, 704 P.2d at 1177.

119. This Article is not meant to provide an analysis of the many cases relating to whether regulatory actions, or exactions, constitute takings. Nevertheless, it should be noted that if governments properly observe the legal protections constraining the level of user charges (*i.e.*, if the imposition of a charge relates to the payor's activities and if the amount of the charge reflects the payor's allocable share of the project or program designed to handle the effect of those activities) a takings challenge to a specific burden offset charge or impact fee will likely fail. *See generally*, *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991); *Margola Assocs. v. City of Seattle*, 121 Wash. 2d 625, 643-48, 854 P.2d 23, 33-36 (1993); *Guimont v. Clarke*, 121 Wash. 2d 586, 603-08, 854 P.2d 1, 10-13 (1993); *Jordan v. Vill. of Menomonee Falls*, 137 N.W. 2d 442, 446-47 (Wis. 1965).

120. *See, e.g.*, *Margola Assocs. v. City of Seattle*, 121 Wash. 2d 625, 640, 854 P.2d 23, 29 (1993).

121. *Id.*

122. *See Teter*, 104 Wash. 2d at 238-39, 704 P.2d at 1080.

123. *See generally* WASH. REV. CODE § 82.02.070 (2002).

124. *See* WASH. CONST. art VII, § 1.

125. *See* WASH. REV. CODE § 82.02.050 (2002).

126. *Id.*

and “reasonably related to,” specific developments.<sup>127</sup> Growth impact fees must be deposited in special interest-bearing accounts<sup>128</sup> and, if not used within a limited time period, are refunded to the developer.<sup>129</sup> Transportation impact fees imposed under Washington Revised Code chapter 39.92 also fit in this category.<sup>130</sup> Both types of impact fees are offset payments to compensate for externalities caused by specific developments—by the burden or increased use of public facilities caused by the development.<sup>131</sup>

Similarly, project-specific fees required as a permit condition to pay for direct project impacts are burden offset charges, which must be proportionate and deposited in a special fund for use solely for the related public improvements.<sup>132</sup> Growth impact fees and transportation impact fees are similar to other burden offset charges. The difference is that impact fees are paid just once and may be held for future capital projects rather than being imposed on an ongoing basis for a continuing system or program.<sup>133</sup>

### C. *Inspection and Processing Fees* (True “Regulatory Fees”)

Inspection fees and processing fees are charges to people who ask the government to pay them special attention, or whose activities give rise to special regulatory oversight.<sup>134</sup> In either case, governments must allocate resources to those projects or activities. Examples are building permit fees,<sup>135</sup> septic or sewer installation charges,<sup>136</sup> the portion of water connection fees used

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127. WASH. REV. CODE §§ 82.02.060(1)(a), .090(3) (2002).

128. WASH. REV. CODE § 82.02.070(1).

129. WASH. REV. CODE § 82.02.080 (2002).

130. WASH. REV. CODE § 39.92.040 (2002).

131. See WASH. REV. CODE § 82.02.050.

132. *State ex rel. Myhre v. City of Spokane*, 70 Wash. 2d 207, 216, 422 P.2d 790, 795-96 (1967); *Southwick, Inc. v. City of Lacey*, 58 Wash. App. 886, 890-93, 795 P.2d 712, 714-16 (1990); *Miller v. City of Port Angeles*, 38 Wash. App. 904, 909-10, 691 P.2d 229, 234 (1984).

133. Mitigation fees imposed under the State Environmental Policy Act (WASH. REV. CODE § 43.21C.060) are also appropriately classified in the “burden offset fee” category. Required mitigation activities or payments must relate directly to the negative externalities caused by a development and identified in environmental documents; the mitigation must be reasonable; and there must be a nexus between the level of the exaction, the use of the mitigation payments and the development itself. WASH. REV. CODE § 43.21C.060 (2002). See RICHARD L. SETTLE, *THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT, A LEGAL AND POLICY ANALYSIS* § 18(b) at 230-31 (Revised Ed. 2002).

134. See generally *infra* text accompanying notes 135-40.

135. E.g., SEATTLE, WASH. MUN. CODE §§ 3.06.050, 22.504.010, 22.900D.010 (2002).

136. E.g., WASH. REV. CODE § 57.08.005(10) (2002).

for an inspector to check a new hookup,<sup>137</sup> housing registration and inspection fees,<sup>138</sup> professional licensing fees,<sup>139</sup> and driver's license examination fees that are used to process an individual's application and exam.<sup>140</sup> These fees are used to pay for the share of the burden an activity places on government operations;<sup>141</sup> such fees are not permitted to exceed the proportionate share of providing governmental oversight of the regulated activity.<sup>142</sup>

These fees are true regulatory fees in that each one is charged to cover the cost of a regulatory program.<sup>143</sup> These charges often fund a part of the cost of public health, building inspections, and other police power activities that otherwise would be financed by taxes.<sup>144</sup> They provide a pinpointed allocation of costs to specific users or activities, thus relieving costs to the general public.<sup>145</sup> If, and to the extent, inspection and processing fees exceed the allocable share of a government police power activity, they may be held to be unlawful as a type of hidden tax to raise general revenue.<sup>146</sup>

#### D. *Special Assessments*

Special assessments have occasionally been referred to as special taxes.<sup>147</sup>

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137. *E.g.*, SEATTLE, WASH. MUN. CODE § 21.04.020 (2002).

138. *E.g.*, SEATTLE, WASH. MUN. CODE § 22.900F.040 (2002).

139. *E.g.*, WASH. REV. CODE §§ 18.106.125, 18.140.050 (2002).

140. *E.g.*, WASH. REV. CODE § 46.20.120 (2002).

141. *See supra* text accompanying notes 135-40.

142. *See supra* text accompanying notes 135-40.

143. *See supra* notes 135-40.

144. Even the state is required to pay local government fees for its share of the cost of filing and processing documents. *State v. Grays Harbor County*, 98 Wash. 2d 606, 607-10, 656 P.2d 1084, 1085-86 (1983).

145. *See supra* notes 135-40.

146. *Margola Assocs. v. City of Seattle*, 121 Wash. 2d 625, 640, 854 P.2d 23, 31 (1993).

147. *See, e.g.*, *State ex rel. Frese v. City of Normandy Park*, 64 Wash. 2d 411, 422, 392 P.2d 207, 214 (1964); *East Hoquiam Co. v. City of Hoquiam*, 90 Wash. 210, 215, 219, 155 P.2d 754, 756-57 (1916). However, Article VII, Section 9 of the Washington Constitution, which authorizes special assessments, empowers local governments "to make local improvements by special assessment, or by special taxation of property benefited." This language suggests that special assessments are something different from "special taxation," which might be a tax that is not uniform throughout a taxing district and is thus different from ordinary local government taxes that Article VII, Section 9 requires to be "uniform in respect to persons and property within the jurisdiction of the body levying the same." WASH. CONST. art. VII, § 9; *Berglund v. Tacoma*, 70 Wash. 2d 475, 477, 423 P.2d 922, 923 (1967) (stating that "[s]pecial assessments . . . are not deemed taxes" for purposes of "uniformity provisions of the state constitution"); *see also* *Smith v. City of Seattle*, 25 Wash. 300, 315, 65 P. 612, 617 (1901) (holding that special assessment bonds do not count against a municipality's limit on bonds payable from taxes).



Conceptually, however, they are not taxes at all. They are, rather, a distinctive form of user charge which allocates the cost of public improvements that increase the value of an asset (property) to the owner of that asset.<sup>148</sup> Like other user fees, the amount of special assessments must relate directly to the cost of the improvements, relate to the value of the improvements to the property assessed, and be deposited in special accounts for the particular improvements.<sup>149</sup> Among the various types of user charges, assessments are similar to commodity charges because they both allocate costs of *positive* externalities to those who benefit from a service, product, or (in the case of special assessments) an improvement.<sup>150</sup>

#### IV. COVELL HELPS PART OF THE WAY THROUGH THE MUDDLE

Much of law is taxonomic in nature. That is, it involves classifying activities by people and institutions so that rules of human conduct can be developed and readily applied to future conduct. To be effective, classifications have to make sense. Courts sometimes apply labels, that on first blush seem to fit, without sufficiently analyzing the underlying characteristics of the activity concerned.<sup>151</sup> In the case of taxes, fees, rates, and charges, Washington court opinions prior to *Covell v. City of Seattle*<sup>152</sup> failed to distinguish the fundamental characteristics of taxes from those of user charges.<sup>153</sup>

The big culprit was *Hillis Homes, Inc. v. Snohomish County* ("Hillis Homes I"), which in 1982 simplistically divided Washington State's revenue world into two parts: taxes and regulatory fees.<sup>154</sup> At issue in that case were county charges imposed on developers to offset the burdens their projects

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148. WASH. CONST. art. VII, § 9.

149. *Bellevue Assocs. v. City of Bellevue*, 108 Wash. 2d 671, 674-75, 741 P.2d 993, 995-96 (1987); Philip A. Trautman, *Assessments in Washington*, 40 WASH. L. REV. 100, 118 (1965).

150. When improvements paid by assessments also have general public benefits, Washington's Supreme Court has left to the legislative authority the choice of how best to allocate the cost of those benefits between general beneficiaries and special users. *See, e.g.*, *City of Seattle v. Rogers Clothing for Men*, 114 Wash. 2d 213, 228, 787 P.2d 39, 47 (1990); *In re Aurora Avenue*, 180 Wash. 523, 529-32, 41 P.2d 143, 145-47 (1935).

151. *See Hillis Homes, Inc. v. Snohomish County*, 97 Wash. 2d 804, 809, 650 P.2d 193, 195 (1982) (*Hillis Homes I*).

152. *Covell v. City of Seattle*, 127 Wash. 2d 874, 905 P.2d 324 (1995).

153. *See Hillis Homes, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 105 Wash. 2d 288, 299, 714 P.2d 1163, 1169 (1986) (*Hillis Homes II*) (citing *Teter v. Clark County*, 104 Wash. 2d 227, 239, 704 P.2d 1171, 1180 (1985)) (reaffirming that the difference between a fee and a tax is that taxes are to raise revenue while fees are to regulate).

154. *Hillis Homes I*, 97 Wash. 2d at 809, 650 P.2d at 195.

placed on roads, schools, parks, and fire protection.<sup>155</sup> The court labeled the fees as unauthorized taxes: "If the fees are merely tools in the regulation of land subdivision, they are not taxes. If, on the other hand, the primary purpose of the fees is to raise money, the fees are not regulatory, but fiscal, and they are taxes."<sup>156</sup> That statement caused a great deal of subsequent confusion because the taxes versus regulatory fee construct neither adequately describes the full range of governmental charges nor provides useful guidance for judges trying to label such charges in later cases.

Taxes *are* to raise money;<sup>157</sup> yet, so are fees.<sup>158</sup> Municipal water utilities do not charge rates for any purpose other than to raise money.<sup>159</sup> However, that does not transform those rates into taxes; nor are water rates *regulatory tools*, as the Washington Supreme Court labeled water connection charges in *Hillis Homes v. Public Utilities District No. 1 of Snohomish County* ("Hillis Homes II").<sup>160</sup> The same problem arose in *Teter v. Clark County*, where the court described storm water charges as *regulatory fees* because the system in question was involved with the "regulation and control of storm and surface waters."<sup>161</sup> The term *regulatory fees* should be restricted to charges on people or property subject to regulation, not to the regulation of water usage or storm water flow. Properly understood, *regulatory fees* are charges to cover the cost of the state's use of its regulatory powers which can be allocated to those who are either voluntarily or involuntarily receiving special attention from government regulators.<sup>162</sup> Such fees cover public expenditures on inspection, record-keeping, and processing, and are correctly limited to the proportionate cost of giving the fee payer that special attention.<sup>163</sup>

Regulatory fees are only one variety, a rather narrow variety, of user fees.<sup>164</sup> So what are water connection charges and storm water utility fees? They are *not* regulatory fees. Instead, they are a different subspecies of user

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155. *Id.* at 806, 650 P.2d at 194.

156. *Id.* at 809, 650 P.2d at 195.

157. *Id.*

158. *See Teter*, 104 Wash. 2d at 234, 704 P.2d at 1177.

159. WASH. REV. CODE § 35.92.010 (2002); *Twitcheil v. City of Spokane*, 55 Wash. 86, 88, 104 P. 150, 151 (1909).

160. 105 Wash. 2d 288, 299, 714 P.2d 1163, 1169 (1986) (*Hillis Homes II*) (approving those charges by squeezing them into the only available non-tax box, the court stated "the District has exacted a connection charge from its new water system customers as part of an overall plan to regulate the use of water").

161. 104 Wash. 2d at 239, 704 P.2d at 1180.

162. *Covell v. City of Seattle*, 127 Wash. 2d 874, 879-90, 905 P.2d 324, 327 (1995).

163. *See Teter*, 104 Wash. 2d at 239, 704 P.2d at 1180.

164. *See id.* (explaining that the fees can only be used for regulating specific activities for which they are collected, making them narrow in scope).

fees: a commodity charge in the case of water<sup>165</sup> and a burden offset charge in the case of storm water control.<sup>166</sup> The outcome in court may be the same because in neither instance are we dealing with taxes. However, it turns out to be helpful if the taxonomy is correct.

*Covell* made a real advance in discerning between taxes and the various types of user fees.<sup>167</sup> That case involved street utility charges levied by the City of Seattle on residential properties.<sup>168</sup> Although the court was split as to whether the particular charges in question were taxes or user fees, there was uniform agreement on the factors to consider:<sup>169</sup>

- First, is “the primary purpose ... to accomplish desired public benefits which cost money, or [is] the primary purpose ... to regulate[?]”<sup>170</sup>
- Second, is “the money collected allocated ... only to the authorized ... purpose[?]”<sup>171</sup>
- Third, is there “a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer[?]”<sup>172</sup>

The *Covell* classifications represented a leap in sophistication. *Covell* recognized that there are different types of user fees—some for the cost of direct regulatory activities,<sup>173</sup> some for the cost of commodities purchased,<sup>174</sup> and others for costs (burdens) imposed on the general public by specific human activities.<sup>175</sup> After applying the factors listed above, the majority in *Covell* determined that the street utility charges in question were hidden property taxes.<sup>176</sup> Although the money was allocated for a specific purpose, the charges were (like property taxes) inescapably imposed on all residential property regardless of whether or not someone was in residence and using the streets.<sup>177</sup>

165. *Twitchell v. City of Spokane*, 55 Wash. 86, 89, 104 P. 150, 151 (1909).

166. *Teter*, 104 Wash. 2d at 234-36, 704 P.2d at 1178 (determining that the appellants' properties added to the burden of storm water control by increasing the amount of surface water the facilities were forced to handle).

167. 127 Wash. 2d at 879, 905 P.2d at 327.

168. *Id.* at 876, 905 P.2d at 325.

169. *Id.* at 879, 905 P.2d at 327.

170. *Id.*

171. *Id.*

172. *Covell*, 127 Wash. 2d at 879, 905 P.2d at 327.

173. *Id.* at 881, 905 P.2d at 328.

174. *See id.* at 889, 905 P.2d at 332.

175. *Id.* at 888-89, 905 P.2d at 331.

176. *Id.* at 891, 905 P.2d at 333.

177. *Covell*, 127 Wash. 2d at 890, 905 P.2d at 332.

Furthermore, the amount of the charges was not individually determined and the city could not prove a direct relationship between the fee and service or between the fee and burden produced.<sup>178</sup> Consequently, Seattle's version of a residential street utility charge failed the first and third *Covell* tests for distinguishing a user fee from a tax.<sup>179</sup>

Yet, *Covell* failed to move the analysis forward in one important respect: in the first factor it clung to the *Hillis Homes I* conceptual dichotomy between a tax-to-raise-money on the one hand, and a regulatory-fee-to-regulate on the other.<sup>180</sup> It implicitly recognized the variety of user fees and the fact that user fees *are* to raise money for a specific purpose rather than for the general fund.<sup>181</sup> Unfortunately, the court did not make those concepts as explicit as it might have.<sup>182</sup> The *Covell* court failed to observe that the key question is not whether a charge is to raise money, but to raise money *for what?* Is the financial imposition to raise money to pay for public goods? For general government? For any public purpose? If so, it is probably a tax. Is the charge to raise money for a specified government service or program with the charge allocated only to those who receive the service or cause a burden? If so, it is probably a user fee.<sup>183</sup> The *Covell* court appears to have understood this distinction, but did not make it as explicit as it could have. Nor did the court relegate regulatory fees to the narrow subcategory of user charges to which they belong. As a result, later cases have continued to parrot the misleading regulatory fee concept.<sup>184</sup> Nonetheless, Washington appellate decisions since *Covell* have applied the *Covell* factors with a fair degree of consistency, and have on occasion worked around the *Hillis Homes I* analytical trap that lingered on through the first *Covell* factor.

## V. THE POST-COVELL CASES

In several cases since *Covell*, Washington appellate courts have been

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178. *Id.* at 884-85, 905 P.2d at 329-30. Ironically, motor vehicle fuel tax verges on being appropriately thought of as a burden offset street use charge instead of a tax. Gas taxes paid by drivers relate directly to road use, and by constitutional mandate, gas tax proceeds are deposited in a special fund for road and highway purposes only. *See* WASH. CONST. art. II §40.

179. *Covell*, 127 Wash. 2d at 889, 905 P.2d at 331-32.

180. *Id.* at 879, 905 P.2d at 327.

181. *Id.* at 888-89, 905 P.2d at 331.

182. *See, e.g.*, *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wash. App. 171, 179, 931 P.2d 208, 213 (1997) (characterizing a permit program for on-site septic tank systems simply as regulatory fees without further explanation).

183. *Covell*, 127 Wash. 2d at 879, 905 P.2d at 327.

184. *See, e.g.*, *Thurston County Rental Owners Ass'n*, 85 Wash. App. at 180-81, 931 P.2d at 214.

called on to distinguish between taxes and user fees. They have done so with a fair degree of understanding of the underlying distinctions between those two general categories of monetary impositions, and with an apparent recognition of the different subcategories of user fees.

A. Thurston County Rental Owners Ass'n v. Thurston County

The first appellate case to apply the *Covell* factors was *Thurston County Rental Owners v. Thurston County*, a challenge to a county permit system for on-site septic tanks.<sup>185</sup> The relevant ordinance required applicants for new septic system permits to pay a seventy dollar fee, and operators of those systems to pay an annual forty dollar fee.<sup>186</sup> There were between 32,000 and 37,000 septic systems in the county, and the program was structured to gradually bring all units under its purview.<sup>187</sup> Fee revenue was used solely to offset administrative costs and to fund enforcement and inspections.<sup>188</sup> The costs of the program exceeded revenue from the fees.<sup>189</sup> The court of appeals applied the *Covell* tests and held: first, the primary purpose of the fees was regulatory;<sup>190</sup> second, the fee revenue was allocated solely to the authorized purpose; and third, there was a clear relationship between the fee charged and the burden produced by the fee payer.<sup>191</sup>

In many respects this was a true regulatory fee because the money was used to administer a septic system registration and ongoing oversight regulation program. But it also had characteristics of a commodity charge because people who relied on well water were buying additional health protection through the program's efforts. As to septic system owners, the charge was rather like a burden-offset charge because the money was applied in part to address the environmental impacts of their septic systems.<sup>192</sup> However characterized, the program and its fees were upheld in their entirety.<sup>193</sup>

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185. *Id.* at 175-78, 931 P.2d at 211-12.

186. *Id.* at 176, 931 P.2d at 212.

187. *Id.* at 175-76, 931 P.2d at 211.

188. *Id.* at 176, 931 P.2d at 212.

189. *Thurston County Rental Owners Ass'n*, 85 Wash. App. at 176-77, 931 P.2d at 208-12.

190. *Id.* at 179, 931 P.2d at 213.

191. *Id.*

192. *Id.*

193. *Id.* at 175, 931 P.2d at 211.

B. *Smith v. Spokane County*

The next case to apply the *Covell* framework was *Smith v. Spokane County*,<sup>194</sup> a challenge to aquifer protection area fees imposed on water and sewer customers pursuant to Washington Revised Code chapter 36.36.<sup>195</sup> The fees were fifteen dollars per year on water withdrawal and fifteen dollars per year for on-site sewage disposal.<sup>196</sup> Households served by municipal sewage systems within the area boundaries were exempt from the sewage disposal fee.<sup>197</sup> Proceeds of the charges were spent on water quality monitoring, sewer construction, and program administration.<sup>198</sup> The *Smith* court reviewed the fees in light of each of the three *Covell* factors finding: (1) the charges were not to raise money generally, but to fund a regulatory program; (2) the money was devoted solely to the purpose of protecting and preserving the aquifer and the sole source of water in the area; and (3) all of those paying the fee were receiving the direct benefit of the program.<sup>199</sup>

The opinion was weakly reasoned and contained very little analysis. For example, the court did not seem troubled by the fact that the static nature of the flat fees bore no relation to the amount of water consumed or the degree of burden placed on the aquifer by any particular property use.<sup>200</sup> Instead, the opinion characterized the charges as analogous to those in *Teter, Hillis Homes II*, and *Thurston County*, and, without much explanation, approved the program in its entirety.<sup>201</sup>

C. *Franks & Son, Inc. v. State*

*Franks & Son, Inc. v. State*,<sup>202</sup> involved a challenge to a “gross weight regulatory fee” that had been imposed on trucks operating within the state.<sup>203</sup> The fees provided the sole source of funding for the Washington Utilities and Transportation Commission’s motor carrier regulatory and safety enforcement programs.<sup>204</sup> The court held that fees were primarily used for the Commission’s

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194. 89 Wash. App. 340, 1348-49, 948 P.2d 1301, 1306 (1997).

195. WASH. REV. CODE § 36.36.030 (2002); *Smith*, 89 Wash. App. at 345, 948 P.2d at 1305.

196. *Smith*, 89 Wash. App. at 346, 948 P.2d at 1305.

197. *Id.*

198. *Id.* at 347, 948 P.2d at 1305-06.

199. *Id.* at 348-51, 948 P.2d at 1306-07.

200. *Id.* at 346, 948 P.2d at 1305.

201. *Smith*, 89 Wash. App. at 352, 948 P.2d at 1308.

202. 136 Wash. 2d 737, 966 P.2d 1232 (1998).

203. *Id.* at 740, 966 P.2d at 1234.

204. *Id.* at 742, 966 P.2d at 1235.

regulatory programs.<sup>205</sup> The plaintiff's challenge was principally that the fee violated the Commerce Clause of the United States Constitution (Art. I, Sec. 8, cl. 3).<sup>206</sup> Whether a Commerce Clause violation existed, depended in part on whether the fee was regulatory or categorized as a tax.<sup>207</sup> The opinion noted "A tax is defined as a levy made for the purpose of raising revenue for a *general governmental purpose*; a fee is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation."<sup>208</sup> Although the opinion repeated the tax versus regulatory fee construct, it moved a step forward by recognizing that both taxes and user fees raise money, and by expressly noting that a tax is for *general* governmental purposes.<sup>209</sup> Applying the *Covell* factors, the court held that since the charges in question were solely for trucking regulatory and safety programs and appeared not to exceed the allocable costs of those programs, the charges were fees rather than taxes.<sup>210</sup>

#### D. Harbor Village Apartments v. City of Mukilteo

*Harbor Village Apartments v. City of Mukilteo*,<sup>211</sup> involved a "residential dwelling unit fee" of \$80.60 charged to every rental unit regardless of whether it was actually rented, the number of rental transactions, or income from the unit.<sup>212</sup> The court concluded the fee was a fund-raising mechanism imposed on property that could not be avoided, therefore constituted a property tax.<sup>213</sup> However, Mukilteo's charge was not a permissible excise tax.<sup>214</sup> The flat character of the city's residential dwelling unit fee meant that it bore no relationship to the nature or size of a business transaction and was, therefore, a property tax in disguise.<sup>215</sup> It is interesting to speculate whether the result in the earlier case of *Smith* would have been the same if it had been decided after *Harbor Village Apartments*, since Spokane County's aquifer protection charge was a flat fee, like Mukilteo's rental unit charge.<sup>216</sup> However, there was more

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205. *See id.* at 751, 966 P.2d at 1239.

206. *Id.* at 743, 966 P.2d at 1235.

207. *See Franks & Son v. State*, 136 Wash. 2d at 746, 966 P.2d at 1237.

208. *Id.* at 737, 750, 966 P.2d 1232, 1237 (emphasis added).

209. *See id.* at 749-50, 966 P.2d at 1238-39.

210. *Id.* at 750-51, 966 P.2d at 1239.

211. 139 Wash. 2d 604, 989 P.2d 542 (1999).

212. *Id.* at 604-05, 607, 989 P.2d at 544-45.

213. *See id.* at 607, 989 P.2d at 544-45.

214. *Id.* at 607, 989 P.2d at 545.

215. *Id.* at 607, 989 P.2d at 545.

216. *Compare Harbor Vill. Apartments*, 139 Wash. 2d at 605-06, 989 P.2d at 544, with *Smith v. Spokane County*, 89 Wash. App. 340, 346, 351, 948 P.2d 1301, 1305, 1308 (1997).

direct benefit or burden offset in the Spokane County program.<sup>217</sup> In any event, that program's fees would be unassailable if they had been structured to reflect differences in water usage or sewage output.<sup>218</sup>

#### E. New Castle Investments v. City of LaCenter

The next case to cite *Covell* was *New Castle Investments v. City of LaCenter*,<sup>219</sup> which addressed the tax versus fee issue in a quite different context: whether "transportation impact fees"<sup>220</sup> vested at the time of preliminary plat approval.<sup>221</sup> Under the vested rights doctrine, permit fees and similar charges related to the grant of a land use permit, vest at the time a land use application is filed.<sup>222</sup> The doctrine does not apply to fees.<sup>223</sup> Here, the court of appeals tried to apply the *Covell* factors to determine whether or not the city's transportation impact fee was a tax or a fee, and thus decide whether or not vested rights existed.<sup>224</sup> In this instance, the attempt to use those factors was something of a failure. The court found the fees resembled taxes because they paid for public facilities (*i.e.*, public goods traditionally paid for by taxes), and because they were set in a broad brush fashion rather than being calculated based on the cost of each new development.<sup>225</sup> The court then changed direction, declining to hold the fees were in fact taxes.<sup>226</sup> Instead, it ruled they were not the *type* of regulatory fees associated with land use control ordinances and protected by the vesting doctrine.<sup>227</sup> In this case, if *Covell* was useful to the court in its analysis, it was not readily apparent in the opinion. The court might have had an easier time if it had recognized that taxes and regulatory fees do not constitute the full array of options, and had considered the possibility that transportation impact fees may simply be a form of burden offset charges.

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217. See *Smith*, 89 Wash. 2d at 350-51, 948 P.2d at 1307.

218. See generally *id.* at 346, 350-51, 989 P.2d at 1305, 1307 (explaining households which do not burden the resources, or burden the resources less would be charged according to use, diminishing complaints of the flat tax charged to all households in the area, absent proof of use).

219. 98 Wash. App. 224, 989 P.2d 569 (1999).

220. WASH. REV. CODE § 82.02.090 (2002).

221. *New Castle Invs.*, 98 Wash. App. at 227-28, 989 P.2d at 571.

222. See *id.* at 231-32, 989 P.2d at 573.

223. *Id.* at 232, 989 P.2d at 573.

224. *Id.* at 233-35, 989 P.2d at 575.

225. *Id.* at 234-35, 989 P.2d at 574.

226. *New Castle Invs.*, 98 Wash. App. at 236, 989 P.2d at 575.

227. *Id.* at 235-36, 989 P.2d at 575.



## F. City of Lakewood v. Pierce County

*City of Lakewood v. Pierce County*,<sup>228</sup> is another muddled case which, like *New Castle Investments*, is constrained by pre-*Covell* thinking that places every governmental charge into one of two boxes.<sup>229</sup> This case arose from the City of Lakewood and Pierce County's inability to agree on a franchise fee amount that the county would pay the city for use of city streets for county sewer lines.<sup>230</sup> The city then attempted to impose the franchise fee on the county.<sup>231</sup> The county responded, in one of its arguments, that under long standing Washington law, a city may not impose a tax without express statutory authorization.<sup>232</sup> The court engaged in a *Covell* factor analysis, concluding the franchise charge was a fee rather than a tax.<sup>233</sup> The court gave three reasons: first, the fee was regulatory in nature; second, the funds would be directed solely to the city's costs of overseeing the county sewer utility's use of the streets; and third, the fee related solely to the burden placed on the city associated with the county's operation of the sewer system under those streets.<sup>234</sup> If franchises are viewed as a mechanism for regulating the use of public right of way, it may be appropriate to characterize franchise fees as true regulatory fees. Alternatively, if franchise fees are rental charges for the use of public facilities, they can be properly treated as commodity charges. In either instance, under rules protecting fee payers, the amount cannot exceed the allocable costs.<sup>235</sup>

But query whether the court needed to have analyzed the situation under *Covell*? The court of appeals in this case ultimately determined that a franchise agreement was a contract and the judiciary was not in the position to force the county to contract with the city or to sign any particular form of agreement or to agree to a specific fee level.<sup>236</sup> Perhaps the tax versus regulatory fee question was inapposite and the entire matter could have been resolved on the grounds that the matter involved neither a tax nor a fee. Indeed, this was just a problem of two municipal corporations unwilling or unable to negotiate a contract—and it would be inappropriate for a court to force them to agree on anything.

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228. 106 Wash. App. 63, 23 P.3d 1 (2001).

229. See *id.* at 74-75, 23 P.3d at 7.

230. *Id.* at 66, 23 P.3d at 3.

231. See *id.* at 66-67, 23 P.3d at 3.

232. *Id.* at 75, 23 P.3d at 7 (citing *Carikonen v. Williams*, 76 Wash. 2d 617, 458 P.2d 280 (1969)); *King County v. Algona*, 101 Wash. 2d 789, 681 P.2d 1281 (1984) (involving a similar attempt by a city to impose a tax on a county).

233. *City of Lakewood*, 106 Wash. App. at 75-76, 23 P.3d at 7-8.

234. *Id.*

235. See *id.* at 75-77, 23 P.3d at 7-8.

236. See *id.* at 74, 77-79, 23 P.3d at 7-9.

## G. Dean v. Lehman

*Dean v. Lehman*,<sup>237</sup> is an example of the *Covell* test being usefully applied.<sup>238</sup> Suzanne Dean was the wife of a prison inmate who challenged an automatic statutory deduction of 35% of funds received by inmates, including amounts from spouses.<sup>239</sup> She asserted, among other things, that the deduction was an unauthorized tax; 10% went to an inmate savings account, 20% contributed to incarceration costs, and 5% was transferred to a victim compensation fund.<sup>240</sup> Although many other issues were involved,<sup>241</sup> the supreme court's *Covell* analysis in *Dean* was correct. Under the first *Covell* factor, the court found the purpose of the deduction was not to raise revenue for general governmental purposes, but to pay for specific programs that either benefited the inmates or their victims.<sup>242</sup> Applying the second *Covell* factor, the court noted the funds collected were deposited in special accounts and allocated solely to the programs associated with those accounts.<sup>243</sup> Third, the court found there was a direct relationship between the amounts deducted and either the services received by the inmate, or the amelioration of burdens placed on the community by that inmate.<sup>244</sup> Accordingly, the charges were not taxes.<sup>245</sup> This is another instance where the fees could be analytically viewed as both commodity charges for the prison rent deduction, and burden offset charges for the victim compensation deduction. Although the opinion did not go into that kind of conceptual detail, it clearly knew a non-tax when it saw one, and *Covell* helped that determination to be made.

## H. Samis Land Co. v. City of Soap Lake

*Samis Land Co. v. City of Soap Lake*,<sup>246</sup> was a *Covell* case examining whether a specific governmental charge should be characterized as tax or a fee.<sup>247</sup> In that instance, the city had imposed a flat rate "standby charge" on vacant, unimproved, and uninhabited lots that abutted municipal water and

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237. 143 Wash. 2d 12, 18 P.3d 523 (2001).

238. *See id.* at 26-28, 18 P.3d at 531-32.

239. *Id.* at 15-16, 18 P.3d at 526.

240. *Id.* at 16, 18 P.3d at 526.

241. *See id.* at 18, 18 P.3d at 527.

242. *Dean*, 143 Wash. 2d at 26-27, 18 P.3d at 531-32.

243. *Id.* at 27-28, 18 P.3d at 532.

244. *Id.* at 28, 31, 18 P.3d at 532, 534.

245. *Id.* at 28, 18 P.3d at 532.

246. 143 Wash. 2d 798, 23 P.3d 477 (2001).

247. *See id.* at 801, 23 P.3d at 480.

sewer lines.<sup>248</sup> A property owner challenged the charge on the grounds that it was an unconstitutional, non-uniform property tax.<sup>249</sup> The city argued the charge was associated with a public health program to prevent the spread of communicable diseases through the water supply, the money was deposited into a restricted fund, and the money was used either to provide services or to offset burdens caused by the payers.<sup>250</sup> Therefore, the city argued, the charges were regulatory fees rather than taxes.<sup>251</sup> The state supreme court disagreed, holding that the charges were primarily to finance broad-based public improvements rather than to regulate, and the city's accounting did not sufficiently demonstrate that the money was in fact deposited into a special fund.<sup>252</sup> Most importantly, the opinion noted the uninhabited vacant lots were not receiving any water service, nor did the facts show they were burdening the public with wastewater.<sup>253</sup> Without a direct relationship between the payer and either the service received or burden produced, the charge could not appropriately be considered a user fee.<sup>254</sup>

*Soap Lake* should be viewed as tracking *Covell* fairly closely. In both cases, the court was troubled by user fees or burden offset charges imposed on properties when the cities had not adequately demonstrated either some directly related benefit or burden.<sup>255</sup> It may be possible for a city to determine that uninhabited houses contribute to street use, or that vacant lots generate waste that needs handling (e.g., vacant/recreational lots on which people camp, thus causing potentially dangerous gray water and human waste). However, neither the City of Seattle in *Covell*,<sup>256</sup> nor the City of Soap Lake in *Soap Lake*,<sup>257</sup> developed facts upon which their respective fees could be sustained. As a result, successful street utility fees and standby charges will have to await a different set of facts and another day.

#### I. Arborwood Idaho, LLC v. City of Kennewick

*Arborwood Idaho, LLC v. City of Kennewick*,<sup>258</sup> was a court of appeals

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248. *Id.*

249. *Id.* at 802, 814-15, 23 P.3d at 480, 487.

250. *Id.* at 804-05, 808-10, 23 P.3d at 481-82, 484-85.

251. *Samis Land Co.*, 143 Wash. 2d at 804-05, 23 P.3d at 481-82.

252. *Id.* at 807-11, 23 P.3d at 483-85.

253. *Id.* at 813, 23 P.3d at 486.

254. *Id.* at 811-14, 23 P.3d at 485-87.

255. *See id.* at 811, 813-14, 23 P.3d at 485-87; *see also* *Covell v. City of Seattle*, 127 Wash. 2d 874, 879, 883-85, 888-89, 905 P.2d 324, 327, 329-31 (1995).

256. *See Covell*, 127 Wash. 2d at 879, 905 P.2d 327.

257. *See Samis Land Co.*, 143 Wash. 2d at 798, 23 P.3d at 477.

258. 113 Wash. App. 875, 55 P.3d 1170 (2002).

evaluation of whether a city's monthly charge for emergency medical services (an ambulance charge) constituted a property tax, an excise tax, or a user charge.<sup>259</sup> The City of Kennewick had imposed the monthly ambulance charge on each occupied residence and business.<sup>260</sup> For residences, the charge was on a per-unit basis and was collected in conjunction with the city's utility bill.<sup>261</sup> If an apartment building (like Arborwood) did not meter utility services to each occupied unit, the city collected the per-unit ambulance charge from the apartment owner and left it to the owner to allocate the charge to each apartment.<sup>262</sup> The *Arborwood* apartment owner contended that if the charge was an excise tax, it was improper because an excise tax must be based on the voluntary action of the person taxed for performing an act and that the apartment owner was not voluntarily subjecting itself by undertaking a specific action.<sup>263</sup> The court in *Arborwood* ruled that although the city could have imposed an excise tax for ambulance services under applicable law,<sup>264</sup> Kennewick had, in this instance, instead imposed a regulatory fee under its general police power.<sup>265</sup> The court of appeals further held that the charge was not a property tax and expressly distinguished the relevant facts from those involved in *Soap Lake* based on the *Covell* factors.<sup>266</sup> The *Arborwood* court held that the ambulance charge was not to raise money for broad-based public improvements, "but instead regulates the fee payers by providing them with a targeted service, a 24-hour emergency service."<sup>267</sup> The court continued that the "targeted service ... alleviates the burden placed on the system by apartment residents."<sup>268</sup> The opinion noted that the second *Covell* factor was satisfied because all money collected from the charge was segregated and used exclusively for the ambulance services, and that the third *Covell* factor was satisfied because there was a direct relationship between the fee charged and the benefit to or burden produced by the fee payer.<sup>269</sup>

*Arborwood* demonstrates the court's increasing sophistication in applying the *Covell* tests; the *Arborwood* facts were correctly distinguished from those in *Soap Lake*. One of the court's key observations was that in contrast with

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259. *Id.* at 877-78, 55 P.3d at 1171-72.

260. *Id.* at 877-78, 55 P.3d at 1171.

261. *Id.* at 878-79, 55 P.3d at 1172.

262. *Id.* at 880, 55 P.3d at 1172.

263. *Arborwood*, 113 Wash. App. at 883, 55 P.3d at 1174 (citing *High Tide Seafoods v. State*, 106 Wn.2d 695, 699, 725 P.2d 411 (1986)).

264. WASH. REV. CODE § 35.21.768.

265. *Arborwood*, 113 Wash. App. at 883-85, 55 P.3d at 1174-75.

266. *Id.* at 887, 55 P.3d at 1176.

267. *Id.*

268. *Id.*

269. *Id.* at 888-89, 55 P.3d at 1176-77.

the street utility charge in *Covell* and the standby sewer charge in *Soap Lake*, the Kennewick ambulance charge was not imposed on vacant units.<sup>270</sup> However, the court of appeals need not have referred to the ambulance charge as a “regulatory fee” imposed under the city’s general police powers.<sup>271</sup> The opinion correctly conceptualized the emergency medical services system as a utility, and it could have simply treated the fees as utility service charges, which, under *Hillis II*,<sup>272</sup> do not need express statutory authorization. Therefore, the court did not have to use the confusing term regulatory fees to describe Kennewick’s ambulance charges. Furthermore, even if Kennewick’s ambulance charges were treated as excise taxes, the fact that they were collected by the apartment owner rather than the ultimate users of the service should not have made any difference in the outcome of the case. Washington’s tax system already relies on businesses to collect excise taxes from consumers; for example, retail sales taxes are required to be collected by businesses and remitted to the Department of Revenue.<sup>273</sup> In any event, *Arborwood* represents a thoughtful application of the *Covell* tests.

## VI. CONCLUSION

*Covell* moved the tax versus fee analysis by recognizing in its second and third factors that there are different kinds of fees—those for commodities or services purchased, and those for offsetting burdens created by human activity.<sup>274</sup> However, *Covell* retains, in its first factor, a broad use of the term regulatory fee and a repetition of the old mantra that taxes are to raise money while fees are to regulate.<sup>275</sup> This is an example of “epithetical jurisprudence,” where a court glues a label on an activity without properly analyzing the underlying concepts behind various available labels to make sure it is applying the right one. It is now time for the Washington Supreme Court to unglue the broad use of the term “regulatory fee” and to limit that concept only to fees paid for processing permits and inspections. By doing so, the court will make explicit an understanding of the underlying concepts that *Covell* implicitly recognized. This will enable judges, lawyers, and the general public to better understand the real nature of charges paid to fund governmental programs.

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270. *Arborwood*, 113 Wash. App. at 889, 55 P.3d at 1177.

271. *See id.*

272. *See supra* note 97 and accompanying text.

273. WASH. REV. CODE § 82.08.050.

274. *See Covell*, 127 Wash. 2d at 879, 881-83 at 327-29.

275. *See id.* at 879, 905 P.2d at 327.

## APPENDIX

## GENERAL CLASSIFICATION OF TAXES, FEES, AND USER CHARGES

CLASSIFICATIONS	EXAMPLES	BASIC CHARACTERISTICS
TAXES	Property Taxes, Excise Taxes, Income Taxes, certain license fees	Imposed to raise money for <i>any</i> governmental purpose. No relationship between tax burden and benefit to an individual taxpayer.
USER CHARGES:		
Commodity Charges	Electrical rates, water rates, connection charges, irrigation assessments	Imposed to pay for the provision of commodities or services of direct benefit to consumer.
Burden Offset Charges	Sewer rates, garbage rates, storm water utility charges, growth impact fees	Imposed to offset cost of handling burdens on others and on public resources ("externalities") caused by payer's activities.
Processing and Inspection Fees (True "Regulatory Fees")	Building permit fees, housing inspection fees, professional licensing fees, certain other license fees	Imposed to pay costs of governmental handling of payer's applications or requests, or to pay for inspection and control of payer's activities.
Special Assessments	LID, ULID, LUD, RID Assessments	Imposed on property to offset costs of capital improvements that directly increase the value of that property.

GENERAL CLASSIFICATIONS, *Cont'd*

CLASSIFICATIONS	PROTECTIONS	ACCOUNTING
TAXES	Express statutory authority always required. Subject to limits, uniformity requirements and other controls on tax levels and allocation of burden among taxpayers.	May be deposited in general fund or any other funds. May be used for any lawful governmental purpose.
USER CHARGES: Commodity Charges	Commodity charges must be uniform within classes of customers and classes of service. May not exceed allocable share of cost.	Must be deposited in special fund. May not be transferred to general fund or other special funds for purposes of those funds.
Burden Offset Charges	May not exceed payer's allocable share of cost of programs or improvements to handle burdens caused by payer's activities. Must be uniform within classes of service and classes of users. Certain impact fees must be used within certain time periods for identified facilities.	Must be deposited in special fund. May not be transferred to general fund or other special funds. Must be used to pay for program facilities or activities.
Processing and Inspection Fees (True "Regulatory Fees")	May not exceed allocable share of cost of processing, licensing or inspection and enforcement program.	Must be used to pay for processing or program activities.
Special Assessments	May not exceed increase of value of property ("benefit") from improvement. Must be fairly allocated among all benefitted properties.	Must be deposited in special assessment fund or bond fund. May not be transferred to general fund or any other special funds. Must be used for specified improvement.

